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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1981

LUIS OSCAR SARMIENTO-PEREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment of the United States Constitution and the existing case law of the Supreme Court of the United States obligated the Circuit Court to decide Petitioner's claim of evidentiary insufficiency notwithstanding the fact that the Circuit Court reversed the conviction of Petitioner on the grounds of procedural trial error?

2. Whether the Circuit Court erred in affirming the lower court's denial of Petitioner's pretrial motions to dismiss the indictment on the grounds of double jeopardy when the legally competent evidence presented by the government at trial against the Petitioner was insufficient to sustain a conviction?

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CASE NO.

in the Supreme Court of the United States

OCTOBER TERM 1981

LUIS OSCAR SARMIENTO-PEREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, LUIS OSCAR SARMIENTO-PEREZ, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on February 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix "A" *infra*, (App.* 1-6) is reported at ____ F.2d ____ (5th Cir. 1982).

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1982, Appendix "B" *infra*, (App. 7, 8). A Petition for a Suggestion for a rehearing en banc was filed in March, 1982, and was denied on April 15, 1982, Appendix "C" *infra*, (App. 9, 10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22, Rules of the United States Supreme Court.

STATUTES INVOLVED

The Federal Statutory provisions involved, 21 U.S.C. 841(a)(1) and 846 are set forth in Appendix "D" *infra*, (App. 11, 12). The statutory authorities for interlocutory appeals from pretrial orders directed to non-frivolous double jeopardy claims, 28 U.S.C. 1291, is set forth in Appendix "E" *infra*, (App. 13).

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*numbers in parentheses prefaced by App. refer to pages of the Appendices.

STATEMENT OF THE FACTS

On December 11, 1978, the Petitioner herein was indicted with Roberto Antonio Aguilar, Laurel Ybanez and Jose Cantu, Jr. by the Grand Jury, Southern District of Texas, Corpus Christi Division for (1) conspiracy to distribute cocaine in violation of Title 21 United States Code, Section 841(a)(1), Section 846; (2) two counts of distribution and possession of cocaine in Corpus Christi, Texas, in violation of Title 21, United States Code, Section 841(a)(1); and (3) two counts of distribution and possession of cocaine in Miami, Florida in violation of Title 21, United States Code, Section 821(a)(1) Appendix "F" *infra*, (App. 14-16).

Roberto Antonio Aguilar, Laurel Ybanez and Jose Cantu, Jr. pleaded guilty to various counts of the aforementioned indictment on June 11, 1978, before United States District Judge O'Conor. (See Clerk's Docket Sheet: Date 6-11-79). The Petitioner filed pretrial motions which were denied and a jury was selected on May 15, 1979. Trial was set for June 11, 1979.

On June 11, 1979, the Court denied Petitioner's "Motion to Quash the Jury Panel" (R-41).** Thereafter, the Assistant United States Attorney called Roberto Antonio Aguilar to the witness stand. Aguilar asserted that he had intentions of pleading the Fifth Amendment and would refuse to testify (R. 44-51). The trial court then recessed for approximately one (1) hour. After the recess, the court granted Petitioner's "Motion to Quash Jury Panel" (R-53). Jury selection commenced for the

**Numbers in parenthesis prefaced by the letter "R" refer to pages of the original trial record.

second time on July 18, 1979. The trial started on July 23, 1979.

The government called Jose Cantu, Jr., one of the co-defendants, as its first witness. Defense counsel thereupon moved for a preliminary hearing ("James Hearing") to determine whether or not there was substantial independent evidence of a conspiracy, the participation of the Petitioner therein, if any, and if the hearsay declarations that the government intended to use were made in furtherance of the conspiracy. The motion for the hearing was granted (R. 130-134). At the hearing, the government called three witnesses, the aforementioned Jose Cantu, Jr., Ismael Fuentes, D.E.A.*** agent, and Albert C. Parish, also an agent of the D.E.A. Cantu testified that he introduced Roberto Aguilar to Fuentes for the purpose of selling cocaine. He stated that Aguilar told him that the cocaine was coming from Florida (R. 135-137).

Fuentes then testified that he met Aguilar who informed him that his (Aguilar's) source was Laurel Ybanez, who had a Colombian brother-in-law who resided in Miami, Florida, and shipped cocaine (R. 138-140).

The balance of agent Fuentes' testimony related to his telephonic and personal dealings with Aguilar and Ybanez. Fuentes never met Ybanez until they were both in Miami. Ybanez at times mentioned his brother-in-law, Oscar (R. 137-146). The only direct contact he had with the Petitioner was when he saw a car allegedly belonging to the Petitioner at Miami International Airport

***Drug Enforcement Agency of the United States Department of Justice.

(R. 153) and when he spoke to someone on the telephone who said his name was Oscar.

The Assistant United States Attorney then asked Fuentes about the post-arrest confession of Roberto Antonio Aguilar. Over the strenuous objection of the Petitioner, said confession was read into evidence by Fuentes as proof of the alleged conspiracy and the alleged participation of the Petitioner therein (R. 146-150). After the hearing, the Court ruled that there was substantial independent evidence of a conspiracy, that the Petitioner was a co-conspirator and that the jury would be permitted to hear all alleged co-conspirators' statements (R. 177).

The trial resumed with the jury present. Agent Fuentes was recalled to testify. His testimony was interrupted by the calling of Roberto Antonio Aguilar to testify (R. 233). A hearing was held and Aguilar stated that based upon the advice of his attorney, he would plead the Fifth Amendment and refuse to testify. Nevertheless, the Court ruled that the confession was admissible into evidence based upon the grounds that the witness was unavailable (Federal Rules of Evidence 804(a)(1)(2) 28 U.S.C.) (R. 236-254). The confession was read to the jury (R. 270-271).

Thereafter, the Petitioner was convicted of all counts in the indictment and sentenced to two consecutive fifteen (15) year terms and a fine of $15,000.00

A Notice of Appeal was filed on July 25, 1979.

In Petitioner's Brief on Appeal, in addition to attacking the use of the confession of Roberto Antonio Aguilar, the Petitioner argued that the evidence, *aliunde* the hearsay, was insufficient to support Petitioner's conviction, and the trial court improperly denied Appellant's Motion for a Directed Verdict of Acquittal (See Rule 29) *infra*, Appendix "G" (App. 17-20).

Subsequently, the United States Court of Appeals for the Fifth Circuit reversed the aforementioned conviction and remanded the case for a new trial. *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981), Appendix "H" *infra*, (App. 21-54).

The reversal was based upon the erroneous submission of the confession into evidence. The court specifically omitted addressing the sufficiency of the competent and admissible evidence although Petitioner had specifically raised this issue on appeal, Appendix "H" *infra*, (App. 54). The Court of Appeals stated:

> "Having determined that the confession at issue in this case was admitted into evidence in violation of the Federal Rules of Evidence we need not decide whether it also violated the confrontation clause of the Sixth Amendment *nor address the other points of error urged by the Defendant on this appeal.*" (Emphasis supplied)

The Petitioner then moved for a rehearing and specifically requested the Court to rule on the sufficiency of the evidence. This was denied without opinion.

On May 21, 1981, Petitioner filed a Motion in the United States District Court, Southern District of Texas, Corpus Christi Division, to dismiss the indictment on the grounds of double jeopardy. Appendix "I" *infra*, (App. 55-61).

The Motion pointed out that the Court of Appeals dealt quite extensively with the sufficiency of the evidence in its opinion, Appendix "H" *infra*, (App. 21-54), notwithstanding its assertion that it did not deal with the "other points of error urged by the defendant on appeal."

Said motion was denied. Appendix "J" *infra* (App. 62, 63). A Notice of Appeal was filed on May 26, 1981, seeking a review of the denial of the motion pursuant to *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Appendix "K" *infra*, (App. 64). Petitioner urged upon the Court of Appeals the propositions that existing case law obligates an appellate court to address the issue of evidentiary insufficiency when raised by an appellant; that the evidence was insufficient *aliunde* the confession and the hearsay based upon said confession to convict the Petitioner, and the retrial of the Petitioner would violate his rights under the double jeopardy clause of the Fifth Amendment. The Court of Appeals affirmed the District Court's denial of the Petitioner's Motion, Appendix "A" *infra*, (App. 1). The Petitioner then filed a Suggestion for Rehearing en banc in March, 1982. This was denied on April 15, 1982, Appendix "C" *infra*, (App. 9, 10).

REASONS FOR GRANTING THE WRIT

1. **Whether the double jeopardy clause of the Fifth Amendment and the existing case law of the Supreme Court of the United States obligated the Circuit Court to decide Petitioner's claim of evidentiary insufficiency notwithstanding the fact that the Circuit Court reversed the conviction of the Petitioner on the grounds of procedural trial error?**

The Petitioner herein placed four issues in front of the Circuit Court for their determination on the appeal from his conviction in the District Court in Corpus Christi, Texas. In addition to three important procedural points, the Petitioner attacked the sufficiency of the evidence (App. 17). In its opinion, the Circuit Court discussed the evidence at length; however, ultimately, the decision turned up in procedural trial error and ignored the allegations made by the Petitioner that the legally competent evidence adduced against him at trial was insufficient to sustain a conviction. *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981) Appendix "H" *infra*, (App. 21-54).

As pointed out to this Honorable Court, the Petitioner has time and time again raised the issue of evidentiary insufficiency before the District Court (App. 55-61) *infra* and the Circuit Court Appendix "G" *infra*, (App. 17-20) to no avail. The Circuit Court in its opinion affirming the denial of Petitioner's motion to dismiss the indictment on the grounds of double jeopardy, stated:

"Since *Green v. Massey*, we have reversed convictions for inadmissible evidence and remanded for new trial even when the only evidence in the record on an essential element was that excluded. Such a reversal was considered a reversal for a trial error. See e.g. *United States v. Williams*, 661 F.2d 528 (5th Cir. 1981). In *Williams* we found inadmissible the only evidence offered of value of the property involved, an essential element in that prosecution. Nonetheless we remanded for a new trial. Because we cannot know what evidence might have been offered if the evidence improperly admitted had been originally excluded by the trial judge, we have concluded that such situations do not present instances of evidentiary insufficiency. Accordingly, after reversal, the matter should be remanded for new trial." Appendix "A" *infra*, (App. 5). *United States v. Sarmiento-Perez*, ____ F.2d ____ (5th Cir. 1982).

Thus, the Petitioner is in the position of having one panel of the Circuit Court ignore his claim of insufficient evidence, Appendix "H" *infra*, (App. 21-54), and a second panel of the Circuit Court state in effect, *assuming arguendo the only evidence that could be used to sustain the conviction of the Petitioner was inadmissible, this constitutes mere trial error and the matter could be properly reversed and remanded for a new trial.* (Emphasis supplied)

This still does not address Petitioner's claim that the legally competent evidence was insufficient to support his conviction nor does it address the issue as to whether

or not the double jeopardy clause of the Fifth Amendment requires the Circuit Court to review the sufficiency of the evidence when an appellant attacks said sufficiency.

It is interesting to note that although the Circuit Court cites *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981), it ignores the language of *Goss*, at pages 1340 and 1341:

> "Because the defendants have assailed the sufficiency of the evidence to support their conviction and because the former jeopardy issue might otherwise arise in the new trial that must ensue, we address the evidence-adequacy claims made by the defendants in this appeal *despite the necessary reversal of their conviction on other grounds.* (Emphasis supplied)

In addition to the double jeopardy clause of the Fifth Amendment of the United States Constitution, federal courts have been obligated by statute to protect sound and substantial interest of those accused of crime and to dispose of appeals in the interest of justice. Title 28, Section 2106, U.S.C. states:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment decree, or order or require such other proceedings to be had as may be just under the circumstances."

Expanding on this theory, the Court stated in *United States v. Wiley*, 517 F.2d 1212, 1218, 1219 C.A.D.C. (1975):

> "In this Circuit that statutory directive has led to a number of rulings protecting the accused's interest and an acquittal when the prosecution has failed to present sufficient evidence to go to the jury. The interest is one for the trial judge to vindicate in the first instance under the command of Rule 29, Fed.R.Crim.P. But if the trial judge fails in this assignemnt, the appellate court will exercise its discretionary authority under Section 2106 to provide that protection even if the defendant may have moved in the alternative for a new trial.
>
> "The doctrine has roots in our 1963 decision in *Cefus v. United States.*[1] There we held that where as here the trial court denies a motion for a judgment of acquittal, the accused is entitled to have the sufficiency of the government's case reviewed on appeal regardless of whether he subsequently put on a defense which filled in the holes of the prosecution's case. The decision fosters one of the greatest safeguards for the individual under our system of criminal justice, 'the requirement that the prosecutor must establish a prima facie case by its own evidence before the defendant may be put to his defense.' That safeguard would be undermined if the judge's error in denying

[1] 117 U.S. App. D.C. 15, 324 F.2d 893 (1963).

> the motion for judgment of acquittal exposed the accused to a retrial at which the prosecution could supplement its case."

The rule of law which prohibits retrials following reversals for insufficient evidence has been carried forward by the Supreme Court of the United States. *Burkes v. United States*, 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141, (1978); *Green v. Massey*, 437 U.S. 19, 57 L.Ed.2d 15, 98 S.Ct. 2151, (1978). In *Burkes v. United States, supra*, this Court stated at 437 U.S. 1, 11; 57 L.Ed.2d 1, 9, 10:

> "The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is essential to the objective of the prohibition against successive trials. The clause does not allow 'the state . . . to make repeated attempts to convict an individual for an alleged offense' since 'the constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.' *Green v. United States*, 355 U.S. 184, 187, 2 L.Ed.2d 199, 78 S.Ct. 221, 77 Ohio L. Ads. 202, 61 A.L.R.2d 1119 (1957); See *Serfass v. United States*, 420 U.S. 377, 387, 388, 43 L.Ed.2d 265, 95 S.Ct. 1055 (1975); *United States v. Jorn*, 400 U.S. 470, 479, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971)."

After stating that:

> "Given the requirement for entry of a judgment of acquittal the purpose of the clause (double jeopardy) would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple' *U.S. v. Burkes, supra*, 437 U.S. 1, 17, 57 L.Ed.2d 1, 13."

the court went on to say:

> "Moreover as *Forman*, 361 U.S. 425, 4 L.Ed.2d 12, 80 S.Ct. 481 has indicated an appellate court is authorized by Section 2106 to *'go beyond the particular relief sought in order to provide that relief which would be just under the circumstances.'* " (Emphasis supplied) *U.S. v. Burkes, supra*, 437 U.S. 1, 17, 18; 57 L.Ed.2d 1, 13, 14.

Thus, *Burkes, supra*, has firmly embedded in our jurisprudence the proposition that an accused may not be subjected to a second trial when his conviction is reversed by an appellate court for lack of sufficient evidence to sustain the jury's verdict. The result did not depend upon whether the defendant had asked for a new trial as part of his relief. This in no way disturbed prior holdings which allowed a retrial when a conviction was reversed for trial error. A recent decision of the Third Circuit Court of Appeals supports Petitioner's claims that:

> (1.) Petitioner was entitled to a review of the sufficiency of the evidence when it was raised

on the appeal in the first instance. (The Circuit Court was obligated to make such a determination).

(2.) Petitioner is entitled to and the Circuit Court is obligated to review the sufficiency of the evidence when raised by a motion to dismiss the indictment on the grounds of double jeopardy. *United States v. McQuilkin*, 673 F.2d 681 (3rd Cir. 1982).

The court in *McQuilkin, supra*, at page 685, noting that it does not agree with the Fourth, Fifth or Ninth Circuits (See footnote 7, page 685) stated:

"Although the evidence which may be reviewed when determining whether a double jeopardy claim has been demonstrated may be the same as that considered on review of conviction, that factor does not destroy appealability. Even though the evidence is reviewed for its sufficiency, it is as *Abney* emphasizes, the nature of the claim that makes the case eligible for immediate appellate review. The defendant 'is contesting the very authority of the government to hail him into court to face trial on the charge against him.' *Id.* at 659, 97 St.Ct. 2040. His position is that based upon the paucity of evidence introduced by the prosecution of the first trial, the government is barred by double jeopardy from proceeding with the impending trial. That is, if we determine as a matter of law that a fact finder could not have found the defendants in the case at bar guilty beyond a reasonable doubt, they would be entitled to a

judgment of acquittal. If, on the other hand, we were to find that there was sufficient evidence in the first trial to preclude acquittal on double jeopardy grounds, the new trial would proceed and that fact finder would then determine appellant's guilt or innocence. The government's argument on the non-collateral nature of the evidence and the similarity of the issues therefore was misdirected and must be rejected.

"As the government acknowledges in determining whether a double jeopardy claim based on the insufficiency of the evidence is appealable as a collateral order, we do not write on a clean slate in this Circuit. In *United States v. United States Gypsum Co.*, 600 F.2d 414 (3rd Cir.) cert. den. 444 U.S. 884, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979) appellants moved on remand for judgments of acquittal based on the insufficiency of the evidence of the first trial. The District Court denied the motion and we permitted an immediate appeal. We reasoned: 'because appellants' original conviction on the charges involved here was reversed on appeal, if the defendants *are correct that the evidence tendered at the first trial was insufficient to support a conviction retrial would subject them to double jeopardy. Burkes v. United States*, 437 U.S. 1, 98 S.Ct 2141, 57 L.Ed.2d 1 . . . (1978) (Emphasis supplied) Consequently, they may appeal the denial of their motion under the "collateral order" exception to the final judgment rule. See *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034,

52 L.Ed.2d 651 (1977). *Id.* at 416. The government seeks to circumvent *Gypsum* by arguing that it should be limited to cases involving its unusual procedural history. The *Gypsum* court noted that when it remanded the case it had 'reversed the appellants' convictions though without ruling on the sufficiency of the evidence.' Id. (citation omitted). The government argues that our failure to rule on the sufficiency of the evidence when the case was previously before us justified our assumption or jurisdiction in *Gypsum* and distinguishes that case from the case at bar. Our analysis of *Abney* and *Burkes* leads us to conclude that *Gypsum* should not be limited as to government desires."

The Petitioner now argues that in view of the foregoing it was the constitutional and statutory duty of the Circuit Court to rule on the sufficiency of the evidence which was among the other points raised by the Petitioner. It is fervently urged by the Petitioner that an order granting a defendant a new trial should not be used by an appellate court to avoid ruling on legal sufficiency of the evidence at the accused's first trial. The Petitioner is clearly entitled to such a ruling by the Circuit Court. The writ therefore should issue.

2. **Whether the Circuit Court erred in affirming the lower court's denial of Petitioner's pretrial motion to dismiss the indictment on double jeopardy grounds, when the legally competent evidence presented by the government against Petitioner at trial was insufficient to sustain a conviction?**

It is the contention of the Petitioner that once the Circuit Court had concluded that procedural trial error was committed and evidence was improperly admitted against the Petitioner at trial, the Circuit Court should have examined the sufficiency of the properly admitted evidence. The reasoning seems sound because improperly admitted and/or excludable evidence is no evidence at all. In fact, the problem seems to be threefold: (1) Was the properly admitted evidence sufficient to sustain a conviction; (2) was the evidence so voluminous as to preclude a review of the sufficiency of the evidence needed to convict the Petitioner; and (3) did the government have ample time to prepare and present its case? The answers to the above questions can be gleaned from the following cases of various Circuit Courts.

In *United States v. Mandell*, 591 F.2d 1347, 1373 C.A. 4 (1979), the Fourth Circuit has stated the problem which was subsequently restated by the Ninth Circuit. Does the appellate court have to examine the sufficiency of the properly admitted evidence and should it bar a retrial if the examination shows that the admissible evidence was insufficient to sustain a conviction? *United States v. Harmon*, 632 F.2d 812, 814 C.A. 9 (1980). Both Circuits agree that the Supreme Court of the United States expressly reserved the question. *Green v. Massey*,

437 U.S. 19, 26 n. 9, 98 S.Ct. 2151, 2155 n. 9, 57 L.Ed.2d 15 (1978).

In commenting on the duty of the court to review the sufficiency of the evidence and apparently relating such reviews specifically to the volume of evidence presented at trial, the court stated:

> " . . . the hard question is whether an appellate court must decide the question of the sufficiency of evidence if it has been presented in the case which would have to be reversed in all events for procedural error. We are of the opinion that ordinarily an appellate court should not be required to decide that question *although we can envision the extraordinary case which might demand it.* (Emphasis supplied) In many cases such as the case at bar, with the vast volume of evidence, it would be doing distinct disservice to decide on an appellate review that if a part of the evidence had been omitted the balance would be sufficient to convict. *United States v. Mandell, supra,* page 1373.

Now, it is urged by the Petitioner that this was not a case where there was an extraordinary volume of evidence presented by the government. The trial took only two days. Nor can it be said that the government did not have an adequate opportunity to present its case. The Petitioner urges upon this court the view that the government did just that. The government cannot argue that it was improperly denied the opportunity to present its entire case against the Petitioner.

In discussing the effect of the government having the opportunity to present a prima facie case, the Court of Appeals for the District of Columbia stated in *United States v. Wiley*, 517 F.2d 1212, 1200 n. 39 C.A.D. (1975):

> "We are cognizant that in most circuits the decision to permit a new trial generally turns on whether the government could supplement its inadequate case if allowed to retry the defendants. See, e.g., *United States v. Koonce*, 485 F.2d 374, 382 (8th Cir. 1973), where the government has put in all of its evidence or the Court of Appeals concludes that there is no realistic possibility of remedying the deficiency, the case is remanded with instructions to dismiss the indictment. See, e.g., *United States v. Snider*, 502 F.2d 646, 656 (4th Cir. 1975); *United States v. Edmons*, 432 F.2d 577 (2nd Cir. 1970); *Murray v. United States*, 403 F.2d 694 (9th Cir. 1968). In some cases a mere possibility of obtaining sufficient evidence has been found adequate to make a retrial just inappropriate. See, e.g., *United States v. Koonce*, 485 F.2d 374, (8th Cir. 1973), *United States v. Morado*, 454 F.2d 167 (5th Cir. cert. den.) 406 U.S. 917 (1972) 92 S.Ct. 1767, 32 L.Ed.2d 116; *Beltran v. United States*, 302 F.2d 48, 52 (5th Cir. 1962).
>
> "We have carefully considered the approach in these and numerous similar cases and conclude that in general it is not in the interest of justice to accord the prosecution more than one fair opportunity to present a prima facie case against the criminal defendant. To do so

would enable the prosecution to utilize evidence presented by the defense to build a prima facie case at retrial and to correct tactical mistakes in order to enhance the prospects of obtaining and sustaining a conviction. Moreover, confining the government to a single prosecution furthers sound judicial administration by creating incentives for thorough preparation and careful presentation of the government's case. These considerations coupled with the policy against multiple prosecutions, the policy underlining Rule 29 and the interest in avoiding disparate treatment of similarly situated defendants . . . outweigh the government's interest in obtaining convictions.

"Our approach is comparable to that taken in some prior circuit court opinions. See e.g. *United States v. Bass*, 409 F.2d 846, 852-53 (5th Cir. 1974) ruled District Judge may refuse to permit a retrial 'if he finds from the record that the prosecution had the opportunity to develop its case . . . at the first trial.)'; *United States v. Smith*, 437 F.2d 538, 542 (6th Cir. 1970). (Retrial hinges in our view on whether the government was unfairly prevented from producing competent evidence), *United States v. Howard*, 432 F.2d 1188-1191 (9th Cir. 1970) where the prosecution 'had the opportunity to fully develop its case or in fact did so and [i]f it did or it appears that it was responsible for its failure adequately so to do then it is not ordinarily fair that the successful appellant should be required to undergo another trial."

The prosecution should not be afforded a second opportunity to supply evidence which it failed to muster in the first proceeding. *Burkes v. United States, supra.*

The Court of Appeals in *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981) Appendix "H", *infra* (App. 21) concluded that the custodial confession of the non-testifying separately tried co-defendant should have been excluded from evidence. They also concluded that said confession was inadmissible at a non-jury "James" hearing in order to establish a prima facie case for the admission of alleged coconspirator hearsay declarations. Thus, the hearsay which was the predicate for the entire case of the government was ruled inadmissible. The Circuit Court thereby ruled on two points of error raised by the Petitioner and excluded from evidence more than ninety percent of the government's case. The language of the court commenting on the evidence justifies the latter conclusion.

Referring to the box containing the alleged cocaine, the Circuit Court said:

> "No evidence other than the (inadmissible) confession referred to below shows that Sarmiento-Perez had placed this box in the trunk of his car or had reason to know of its contents. (App. 33)
>
> "It (the Aguilar confession) was the only direct evidence identifying the defendant as the source of the illicit drugs and as a full fledged participant in the criminal enterprise. (App. 51)

"The other evidence connecting Sarmiento-Perez with the crime consisted of hearsay references . . . (App. 51)

"In addition the Aguilar confession was the only evidence adduced from a participant in a criminal enterprise that directly implicated Sarmiento-Perez. (App. 52)

"Without Aguilar's confession and the admitted coconspirator references to Sarmiento-Perez, only the observations of the D.E.A. surveillance agents and the fact that an unknown voice on the telephone identified himself as Oscar and once as Luis remained to connect this defendant with a criminal enterprise . . ." (App. 53)

The Circuit Court, without actually excluding a laboratory report from evidence, commented that "we have serious reservations about the propriety of admitting such evidence under these circumstances as a business record." (App. 54)

Thus, the Petitioner now contends that the Circuit Court in effect ruled on the sufficiency of the competent evidence adduced against the Petitioner at trial. Petitioner further states that the Court clearly found the evidence was insufficient to support a conviction on any of the counts of the indictment. Petitioner contends that in view of the language of the Court the Petitioner is entitled to an unequivocal ruling as to the sufficiency of the evidence presented against him. It is the further contention of the Petitioner that the evidence was insufficient to support a conviction on any of the counts of the indictment.

CONCLUSION

It is the view of the Petitioner that an analysis of all the authorities can lead to only one fair rule, that is when an appellant urges both "procedural trial error" and "insufficiency of evidence" (failure to grant a motion for a judgment of acquittal) the Appellate Court is obligated to decide both issues under the following circumstances:

1. The government had a full and fair opportunity to present its entire case against the defendant; and

2. The evidence was not so voluminous as to cause the Appellate Court concern as to whether or not, if some portion of the evidence was omitted, the balance would be sufficient to convict the defendant.

The evil which has been condoned by the decision below is plain. The Petitioner seeks no more than fundamental fairness in the application of the mandate of this Court in its interpretation of the Fifth Amendment as this Court itself would render. No less is expected within the federal criminal process. Because of the error as outlined above and the reasons for granting this Writ, this Petition is deserving of a review by this Court.

For each and all of the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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